UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ARCHER AND WHITE SALES, INC. Plaintiff, v. HENRY SCHEIN, INC., et al. Defendants.	Civil Action No. 2:12-CV-00572-JRG **ORAL ARGUMENT REQUESTED**

DEFENDANTS' JOINT SEALED RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MOTION *IN LIMINE* NO. 12

Archer's Supplemental Motion *in Limine* is puzzling at several levels. First, it claims Defendants intend to bring an "unpleaded and undisclosed counterclaim alleging that Archer breached a contract" and cites Rule 8(a) to exclude such a counterclaim. Dkt. No. 472 at 1. Yet no Defendant has had the opportunity to file an answer under Rule 8(a) because the Rule 12 Motions to Dismiss are pending. Second, and more importantly, Defendants made clear in the meet-and-confer process that no Defendant intends to bring such a breach-of-contract counterclaim against Archer. Instead, Defendants intend to do what their Initial Disclosures state they will do and what they are entitled to do in defense of these claims: Demonstrate that they terminated Archer for legitimate reasons that have nothing to do with an alleged conspiracy. Some, but certainly not all, of these reasons relate to Archer's failure to follow the requirements of the distribution agreements that Archer agreed to follow.

Contrary to Archer's argument, this has long been disclosed to and known by Archer, both contemporaneously with Mr. Archer himself in business communications at the time, but also in explicit disclosures, through discovery, and in motions practice. To start, Defendants are required in initial disclosures only to state "the legal theories and, *in general*, the factual bases of the disclosing party's claims or defenses (*the disclosing party need not marshal all evidence that may be offered at trial*)." *See, e.g.*, Ex. A, Mfr. Defs.' Initial Disclosures at 1 n.1 (Mar. 1, 2017) (emphases added). Although this is not an affirmative defense in the sense defined in Rule 8, in the Manufacturers' initial disclosures, they state "Archer will not obtain in discovery any facts sufficient to sustain a claim that any Manufacturer Defendant engaged in any contract, combination, or conspiracy in restraint of trade." *Id.* at 3–4. One proof of this contention is that the Manufacturers had legitimate reasons to terminate Archer, including but not limited to Archer's failure to adhere to key provisions of the dealer agreement.

Discovery made this clear, as well. For example, Archer's Interrogatory No. 1 asks the Dental Companies to identify distributors who have been terminated or have had their territory or scope of distribution rights limited, including the reasons why. Ex. B, Mfr. Defs.' Resp. to Pl.'s Interrogs. at 8 (July 17, 2017). Part of the Manufacturing Defendants' July 2017 response as to why certain distributors were terminated states that "authorized distributors are required to agree to standard terms and conditions in distributor agreements." *Id.* at 9. Those responses, attached, go on to explain precisely what parts of the dealer agreements the Dental Companies would rely on for termination decisions. *Id.* at 9–11. Thus, it was no surprise when the Dental Companies' Rule 30(b)(6) witness testified that one of the reasons for Pelton & Crane's termination decision was "the fact that Archer & White repeatedly went outside the geographic territory selling product where they were not supposed to sell product," in violation of its dealer agreement. Ex. C, Excerpt of P. Foster Dep. at 154:19–156:14. Finally, Defendants' experts cited similar bases for Archer's termination. Dkt. No. 298-4, Expert Rep. of R. Maness ¶ 114.

The Dental Companies also raised this justification for Archer's termination in their motion for summary judgment filed in 2017. One reason for terminating a distributor was "how well it adhered to the terms of its distribution agreement," and that "[p]ursuant to this process," they chose other distributors over Archer and in 2014 "terminated Archer from distributing their products." Dkt. No. 299 at 7–8.

Never at any of these junctures has Archer protested that Defendants somehow failed to disclose a supposed breach of contract claim, asked for more discovery on the issue, or asked for a particular theory or evidence to be excluded on the basis of an alleged non-disclosure. This is nothing more than a transparent last-ditch effort to avoid what Archer knows is a devastating blow to its non-existent conspiracy theories. The Court should deny this Motion.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All counsel of record has been served with a true and correct copy of the foregoing by email on this 14th day of January 2020.

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